United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4099 75-4126

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Docket No. 75-4099

AMERICAN CAN COMPANY,
Petitioner,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Intervenor,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Docket No. 75-4126

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
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against

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REPLY BRIEF OF PETITIONER AMERICAN CAN COMPANY

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Preliminary Statement

This brief constitutes the answering brief of American Can Company to so much of the initial briefs of the Na-

tional Labor Relations Board ("Board") and of Local One, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO ("ALA") as seeks enforcement of a Board order which found that American Can Company violated Sections 8(a), (1), (2) and (3) of the National Labor Relations Act ("Act"), and the reply brief of American Can Company to so much of the initial brief of ALA as seeks review of that portion of the Board's order which found that American Can Company did not violate Section 8(a) (5) of the Act.

POINT I

The Board and the ALA fail to cite any authority to refute the proposition that under the *General Extrusion* doctrine craft employees hired subsequent to an election at a new plant may be properly accreted to the unit.

The focal issue which the Board and the ALA strain to find in this case is "a real question concerning representation." Their arguments ignore the realities of how unions gain representational status. Moreover, the Board ignores the concept of "accretion" of groups of workers into a production and maintenance unit in those situations in which a new plant facility had been organized by a union before all its job titles and job slots have been filled.

The NLRB process for the conduct of representation proceedings is triggered by a demand for recognition whereby a union claims that employees then employed by an employer have demonstrated that they want that union to be their collective bargaining representative exclusive of all other unions. Such a demand for recognition may occur even though it concerns a new plant which does not yet have its entire complement of employees. In such a situation, a representation election may be held pursuant

to the Board's *General Extrusion* rules when the employees hired equal 30% of the planned positions and represent 50% of the planned job classifications.* Implicit in the *General Extrusion* rules is a presupposition that unfilled job categories will be added to the unit as they are filled. The General Counsel totally fails to explain why a craft group cannot be accreted to a production and maintenance unit in an expanding unit situation. The Board has never so ruled. The General Counsel's argument disregards the settled principle that several units may be appropriate, and that the unit chosen need not be the "most appropriate unit." *A. S. Beck Shoe Corporation,* 92 NLRB 1457 (1951). While a unit confined to lithographers may be an appropriate separate unit, it is likewise appropriate to include lithographers in the overall unit absent a determination by the Board that they are entitled to separate representation.** Since it is well settled that an overall production and maintenance unit, including crafts, is not inappropriate, the only possible ground on which the Board could have found a violation would be on the basis of the company's conduct after the election and the Board's certification. Here the Board found that the signing of the agreement, which was negotiated pursuant to its certification and the mandate of Section 8(d) of the Act, constituted a violation of Section 8(a)(2) because the agreement covered all production and maintenance employees at the Regency Plant (the unit set forth in the Board's certification) and did not exclude the as yet unhired lithographers. However, since the lithographers were accreted to the unit pursuant to the Board's own rules, no violation of the Act could have occurred.

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* *General Extrusion Company, Inc.,* 121 NLRB 1165 (1958).

** The Board has certified an overall production and maintenance unit including lithographers at the Company's plants at Atlanta, Ga., Fairport, N.Y., Needham, Mass., Morrisville, Penn.; Tampa, Florida, Indianapolis, Ind., Hammond, Ind., and Puerto Rico.

The ALA Failed to Obtain the Support of Any Regency Employee and Therefore Could Not Raise A Real Question Concerning Representation.

When a union makes a demand for recognition—in an expanding plant situation or otherwise—and has evidence to support its claim, "a real question concerning representation" then exists. Once that plateau has been achieved the *Midwest Piping** doctrine and the other rules regarding the conduct of representation proceedings become applicable.

The concept ignored by the ALA is the requirement that it must *first* gain some minimal support of the employees in an appropriate collective bargaining unit. After such support is obtained—support by a minimum of 30% of the employees in the unit**—then and only then will the NLRB determine the appropriateness of the unit and whether a *majority* of the employees in the appropriate unit want the union to be their collective bargaining agent. In the instant case, the ALA never had—nor has it ever claimed to have had—any support of any employee employed by the Company at its Regency plant. Thus, the ALA was incapable at all times of raising a question concerning representation or triggering NLRB representational procedures.

The *Midwest Piping* Doctrine becomes applicable when there is a real question concerning representation and two or more unions are competing simultaneously for the same group of employees. In that circumstance an employer may not arbitrarily choose between the competing unions. An employer does not violate the *Midwest Piping* Doctrine by recognizing a union unless a competing union can show

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* *Midwest Piping and Supply Co. Inc.*, 63 NLRB 1060 (1945).

** National Labor Relations Board, Field Manual, Section 11022.3(a).

that there was "a real question of representation" in existence at the time of the recognition—*i.e.*, that they also had real support of employees and that the employer arbitrarily chose between the two competing unions.* *Playskool Inc.* v. *NLRB*, 477 F.2d 66 (7th Cir., 1973); *NLRB* v. *Swift & Co.*, 294 F.2d 285 (3rd Cir., 1961).

The ALA admits in its brief that it was not a genuine contender. The ALA was not a union which could show that Regency employees supported it as a collective bargaining agent. The ALA concedes that it could not have participated in the election.** It could not have participated simply because it had literally no employee support; it could have intervened with only one authorization card.***

Absent a competing union or a real question concerning representation, no violation of Section 8(a) (2) of the Act could have occurred at the time the Board conducted the election in which the Steelworkers demonstrated their majority support. Any theory constructed to create a violation necessarily entails an unwarranted extention of the *Midwest Piping* Doctrine—a result uniformly struck down by the Courts.****

The ALA complains that the cases cited by the Company illustrating the Courts' refusal to permit an extension of the *Midwest Piping Doctrine* are limited to cases in which

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* The Board in its brief at page 12 enumerates various ways employers can run afoul of *Midwest Piping* such as in situations in which an employer recognizes a union other than the incumbent, where a contract claim is made, or in an instance in which the bargaining unit is being altered from a multi-employer to a single employer. The instant case is devoid of all these factors.

** ALA Brief, page 32.

*** National Labor Relations Board, Field Manual, Section 11022.3(d).

**** *NLRB* v. *Peter Paul, Inc.*, 467 F.2d 700 (9th Cir., 1972) and other cases cited at pp. 16-17 of the Company's main brief.

two or more unions were competing for *currently* employed persons (Brief 27).

The ALA—and the Board—suggest that somehow unions can compete for future employees and that a real question of representation can exist by some means other than a showing that employees are then seeking representation by a particular union.* This further illustrates the fallacy of the Board's conclusion because neither the ALA nor the Board cite a single case in which a "real question concerning representation" was found and upheld by the courts in which persons were not already employed.** At the same time, it disregards the fundamental principle of the NLRB that the right of representation belongs solely to the employees, not to the employer and not to a labor organization. The only representation right the Act recognizes is that of the majority of the employees in an appropriate unit.

General Counsel in seeking to support the Board's decision recognizes the dilemma of trying to support a theory which holds that "a question concerning representation" can exist even if no employee is employed. General Counsel therefore alters its argument and contends that

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* The ALA avers that the Company contends that a question of representation exists only when there is a showing of majority support. The Company does not contend that a majority showing is necessary—only that some real support be present.

** ALA seeks support in its position in *NLRB* v. *Hudson Berlind Corp.*, 494 F.2d 1200 (2nd Cir., 1974), *cert. denied,* 419 U.S. 897 (1974), discussed at page 26 of the Company's main brief, and in *Empire State Sugar Co.* v. *NLRB,* 401 F.2d 559 (2nd Cir., 1968). Like *Hudson Berlind, Empire* is clearly distinguishable from the present case, and in fact illustrates what a real question concerning representation involves. In *Empire* there were current employees who had signed cards for rival unions. The company recognized one union, not on the basis of a Board conducted election, but on the basis of a card check by a clergyman, of which one union was not informed, and in which the clergyman was not informed of the rival claims and cards.

"the Company clearly had no grounds for believing that the ALA would not have a representative interest among such employees [the ones not yet hired] sufficient to create 'a question concerning representation.' "* The General Counsel argues that the Company offered employment at the Regency plant to five lithographers formerly employed at Hudson and further argues that had not the Company applied the terms of the Steelworkers' contract to the lithographers "it is likely that a substantial number of the lithographers employed at the Regency plant would have been ALA adherents from the Hudson plant."**

The General Counsel's speculations in this regard not only raise grave questions under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)—there is no such suggestion in the Board's decision that it considered such a theory—but seem wholly contrary to the evidence; the General Counsel omits any reference to testimony by the plant manager which shows how the Company went about hiring the 30 lithographic employees it planned to hire at Regency (Tr., 176a).*** Of all the lithographers employed at Hudson, only 5 lithographers were considered by Regency for employment (Tr., 182a). As the plant manager testified, qualified lithographers were applying for the 30 lithographers positions from other sources, and it is clear that the plant manager had no intention of considering any other Hudson lithographer for employment at Regency (Tr., 182a). Thus it was

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* Bd. Brief, p. 13.

** Bd. Brief, p. 13.

*** References to the record are denoted by their source. The Joint Appendix page number is referenced as "—a" and line designations are referenced as "[—]" where appropriate. Thus, the official transcript is noted as (Tr., —a); the decision of the Board is noted as (Bd. Dec., —a); the decision of the Administrative Law Judge is noted as (ALJD, —a[—]); exhibits of the General Counsel are noted as (GC—, —a); Company exhibits are noted as (Co. Ex —, —a) and Steelworkers exhibits are noted as (S. Ex. —, —a).

unlikely that a substantial number of the lithographers employed at Regency would have been ALA adherents.

General Counsel further argues that the Company's position would deny the lithographers the right to separate representation solely because an election was held in one overall unit before they were hired.* General Counsel fails to acknowledge that a craft group can opt out of an overall production and maintenance unit by a timely filed craft severance petition and a subsequent craft severance election. *Mallinckrodt Chemical Works,* 162 NLRB 387 (1966). But for such an election to take place the petitioning union must meet the Board's basic requirement for the filing of a petition—that 30% of the employees in the craft unit want separate representation.

Thus we always come back to the basic problem that the ALA failed to organize an appropriate unit of Regency employees and prove that it is a majority representative. What the ALA now seeks is to be put into a position it is not entitled to—that of having an opportunity to organize the Regency plant lithographers without having to compete with an incumbent union as they would be required to do if they filed a craft unit severance petition pursuant to the Board's *Mallinckrodt* procedure.

POINT II

There is substantial evidence on the record to support the Board's finding that the company did not violate Section 8(a)(5) of the Act.

In its brief the ALA urges the Court to reverse the Board's findings of fact and conclusions of law on the 8(a)(5) portion of the case. The ALA argues that the

* Bd. Brief, p. 16.

"the Company clearly had no grounds for believing that the ALA would not have a representative interest among such employees [the ones not yet hired] sufficient to create 'a question concerning representation.' "* The General Counsel argues that the Company offered employment at the Regency plant to five lithographers formerly employed at Hudson and further argues that had not the Company applied the terms of the Steelworkers' contract to the lithographers "it is likely that a substantial number of the lithographers employed at the Regency plant would have been ALA adherents from the Hudson plant."**

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Board erred in finding that Regency was not a continuation of the Hudson plant, that the Company did not frustrate the course of bargaining by committing independent unfair labor practices, that the ALA waived its right to bargain over effects, and that the Employer did not violate the Act by refusing to recognize and bargain with the ALA as the exclusive representative of the lithographic department employees at the Regency plant (ALA Brief pp. 6-7).

The appropriate standard for review of the Board's decision is the substantial evidence test set forth in *Universal Camera Corp.* v. *NLRB,* 340 US 474 (1951). Despite the ALA's assertion that the Board's decision is not well founded (Brief, p. 7), the ALA's brief fails to cite any substantial record testimony in support of its argument.

The Board's findings with regard to the lack of record evidence proving a violation of Section 8(a)(5) of the Act are a necessary result of ALA's failure to establish itself as a bargaining representative either by successfully bargaining with the Company to gain employment at Regency for employees represented by ALA at the old Hudson Plant, or by winning a representation election. Substantial record evidence supports the conclusion of the Board and its Administrative Law Judge that:

> (1) The Regency plant was not a simple removal of Hudson to a new location (ALJD, 32a[26-49]).
>
> (2) The Lithographic Department at Regency is not a continuation of Hudson (ALJD, 33a [10]).
>
> (3) There was no attempt by the Company to conceal the fact that production would begin at Regency in July 1973, and that inevitably lithographic production work would be transferred there (ALJD, 34a[31-33]).

(4) ALA made no attempt to negotiate with the Company about the effects on its members of the closing of Hudson (ALJD, 34a [34-36]).

(5) The Company did nothing to frustrate the course of bargaining by committing independent violations of Section 8(a)(5) (ALJD, 35a[39-41]).

In these circumstances the Board properly concluded that the Company did not refuse to bargain because: (1) the Company had no absolute or automatic obligation to recognize ALA as the bargaining representative of lithographic production employees at Regency merely because it had represented such employees at Hudson (ALJD, 33a [25-29]); (2) while the Company had an obligation to bargain with ALA about the effects of closing down Hudson on the employees whom it represented there, if requested to do so (ALJD, 33a [18-31]), the Company need not have agreed to whatever demands the ALA made (ALJD, 35a [19-22]); and (3) the ALA never even put the Company to the test by requesting bargaining (ALJD, 35a [21]) and that ALA therefore waived its right to bargain over the effects of the closing (ALJD, 35a [21-22]).

A. Substantial evidence supports the Board's finding that "neither the lithographic department at Regency nor the entire plant is a 'mere relocation' or continuation of the business and process formerly conducted at Hudson."

The record shows that Regency was created for a limited purpose—the production of aerosol cans. Without belaboring the details of the evidence, the Administrative Law Judge's comparison of the two facilities serves to provide a framework for viewing the pertinent facts (ALJD, 18a). Hudson, a complex of 8 buildings with over 1,100,000 square feet of space which produced over one billion con-

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A. Substantial evidence supports the Board's finding that "neither the lithographic department at Regency nor the entire plant is a 'mere relocation' or continuation of the business and process formerly conducted at Hudson."

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tainers on 40 automatic can manufacturing lines (Tr., 205a) (of which only 4 manufacturing lines were for aerosol cans) was of a different class than the 364,000 square foot single line Regency plant. Until 1972, Hudson produced virtually all sizes and styles of metal containers for various product lines (Tr., 206a-207a). When Hudson ceased producing some of these containers, their production was moved to other locations of American Can (Tr. 207a) and the 98 supervisors were retired or transferred to other plants located throughout the country (ALJD, 21a[7]).

No one now contends that the old Hudson plant—with its varied products—was somehow continued at Regency. No one even contends that the lithographic department at Hudson was moved to Regency. The ALA argues only that that portion of the old Hudson lithographic department which serviced the aerosol can operation was transferred to Regency and that a transfer of part of a whole operation could somehow endow them with rights at the new plant.* It makes this argument in spite of the fact that when lithographic equipment was transferred to the Company's Hillside, New Jersey plant (where the ALA already represents employees) it failed to make a similar claim and did not insist that employees from Hudson transfer to Hillside when the Company hired new employees from the ALA hiring hall. (Tr., 262a).

The record supports the ALJ's determination that Regency had its own unique mixture of skills and job classifications (Co. Ex. 8), and that its equipment—which came

* Although the ALA objects to the ALJ's comparison of the two plants (ALA Brief p. 9) and purports to assert a standard for determining continuity, albeit without citations, its argument only considers the lithographic department and not the Regency plant as an entity (ALA Brief p. 10).

from various Company plants—and can lines were uniquely configured (Tr., 257a-258a). For example, Regency utilizes a new method of production including a new type of side seaming operation, and a new ultraviolet lithographic curing process. (Tr., 257a)* Regency did obtain some of its presses and ovens from Hudson, but the remaining Hudson lithographic production equipment was either transferred to other locations (presses were sent to its plants at Hillside, New Jersey and Englewood, Illinois; ovens were sent to New Orleans, Louisiana and earmarked for its international operations (Tr., 261a; ALJD; 20a [40]) or scrapped.

Thus the Board's finding that neither Regency nor the lithographic department at Regency is a "mere relocation" of Hudson, is supported by substantial record evidence.

B. Substantial evidence supports the Board's finding that the ALA did not establish itself as the bargaining representative for the lithographers at the Regency plant.

A duty to recognize a union at a new location does not arise from a "naked" claim of "mere relocation" of the old operation; rather, the union must establish its majority status at the new location, and thus legally obligate the Company to recognize it. *NLRB* v. *Jacobs Manufacturing Co.*, 196 F.2d 680 (2nd Cir., 1952). Thus, even if Regency were a relocation of Hudson, the ALA still had to do some-

* ALA's assertion that "the lithographic process is the lithographic process and it makes no difference whether the process is applied to a beer can, an aerosol can or whatever— . . ." is not true. While units limited to lithographic employees have been found to be appropriate for collective bargaining, the Board has also found such units to be inappropriate. *Continental Can Co.*, 171 NLRB 798 (1968); *Kaiser Aluminum & Chemical Corporation*, 177 NLRB 682 (1969).

thing more than just claim that a relocation had taken place.*

The mere existence of a collective bargaining agreement at an old plant has never been held to create a vested right to follow work to a new or relocated plant. *Oddie v. Ross Gear and Tool Co.*, 305 F.2d 143 (6th Cir., 1962), *cert. denied*, 371 U.S. 941 (1962); *Cooper Thermometer Co.* v. *NLRB*, 376 F.2d 684 (2nd Cir., 1967); *cf.* (ALJD, 33a [15]). At most, the Act requires that, as an aspect of bargaining over the effect of a move, an employer must negotiate with the incumbent union at the old plant, the basis on which employees there may transfer to the new plant, if the union requests such negotiations. *Cooper Thermometer Co.* v. *NLRB, supra; Westinghouse Electric Corp.*, 174 NLRB 636 (1969). *In Fraser and Johnston* v. *NLRB*, 469 F.2d 1259 (9th Cir., 1972)** the Court described the duty to bargain in a relocation context as follows:

> "While the Company was under no obligation to accede to the demands of the union that the employees be transferred with full seniority, union representation, and other rights, it was required to bargain in good faith over that issue. *NLRB* v. *Lewis*, 246 F.2d 886 (9th Cir. 1957)." (469 F.2d at p. 1262-1263)

It was argued in *Fraser and Johnston* that the employer had a duty to recognize the union at the new location,

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* A comparison of the ALA's approach to representing the new Regency lithographers and the Steelworkers' method of securing its status as bargaining representative at Regency illustrates the difference between the right way and the wrong way. The Steelworkers organized the employees, obtained cards from 30% of them and then filed a petition with the Board, which then conducted an election in an appropriate unit.

** See also *NLRB* v. *Die Supply Corporation*, 393 F.2d 462 (1st Cir., 1968).

despite its lack of majority status, on the grounds that but for the employer's refusal to bargain in good faith about the effects of the transfer, a majority of the lithographic employees would have been employees who transferred from the old plant. This reasoning was rejected because in the Court's view:

> "The Board might well have been warranted in finding that a majority of the employees would have transferred had they been able to take the San Francisco contracts with them, since the large majority of the unions' employees indicated that they wished to transfer with all union rights and benefits. However, the only indication in the record of those willing to transfer without all their union rights were the 65 employees who actually made applications at San Lorenzo.
>
> "The trial examiner's findings that a majority would have transferred was evidently based on the assumption that the Company would have agreed to the transfers with full union rights had it bargained in good faith. We are unable to sustain such an assumption since § 8(a)(5) only required the Company to bargain in good faith about transfers, and the evidence makes it fairly certain that such bargaining would not have resulted in the Company agreeing to transfers with full union rights intact." (469 F.2d at p. 1264).

The ALA makes the same argument here even though it did not make a request to bargain about the effects of the closing until May 21, 1974, 21 months after the announcement of closing and after Regency in fact opened. (ALJD, 35a [1-72]; Co. Ex. 5, 351a). Thus the ALA is attempting to stretch the rationale of the Board decision

which the Ninth Circuit overturned in *Fraser and Johnston* to apply to a case in which no timely "effects bargaining" request was ever made.

Besides showing that ALA never made a timely request to bargain about "effects", the present record shows that the Company only offered jobs at Regency to 5 of the Hudson lithographers, that all of them declined to accept the offered employment, and that the Company was able to secure a sufficient number of employees at Regency to fill its planned complement of 30 at the wage and benefit levels offered to the 5 former Hudson employees.* There is no record evidence that the Company would have offered employment to any other Hudson lithographer or that a majority of the lithographic employees at Regency would have been employees formerly from the Hudson plant. There is likewise no evidence that had the ALA timely requested to bargain about the effects of the closing of Hudson the Company would have agreed to the demands and conditions that the ALA would have sought to impose. Section 8(d) of the Act explicitly states that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Thus the Board could not presume that an agreement would be reached. *H. K. Porter Co. Inc.* v. *NLRB,* 397 U.S. 99 (1970). There is no evidence of any refusal to bargain on the Company's behalf and no evidence of any timely request for such bargaining by the ALA.

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* In the instant case four ALA employees at Hudson testified that they would have transferred to Regency only if the ALA was assured of following and only if their benefits and wages remained the same. (Tr., 117a, 127a, 148a, 230a) There is no evidence in the record that if the ALA had requested to bargain about the effects of the Hudson shutdown, the Company would have agreed to transfer ALA members with full union rights intact, and there is strong evidence in the record, specifically the conversations among Hansen, Leser and Buly, (Tr. 291a-292a) that it would not have done so.

As the Board concluded, there is no basis to order the Company to recognize the ALA as a majority representative at Regency. What the ALA seeks from this Court is an order giving the ALA a status it could have achieved only as a result of successfully negotiating terms of transfer or by filing a representation petition and winning an election. While the ALA could have made a lawful demand to bargain about the transfer of employees to the new location as part of overall discussions about the effects of the Hudson shutdown—a right it never exercised—the Company did not have to accede to that demand. To require the Company to transfer employees and recognize the ALA as the collective bargaining agent of lithographic production employees would be to require the Company to do something it would not have had to agree to in negotiations.

Further, if the Company were now required to recognize ALA, a bargaining representative would be imposed on the Regency employees without reference to their choice. See, *Fraser and Johnston Co.* v. *NLRB, supra.* While the Board refrained from this absurdity, its order divesting the Steelworkers of the right to represent the lithographic production employees at Regency has created an anomaly unprecedented in prior decisions. While courts generally will not examine the scope of the Board's unit determinations, the Board's amendment to the certification as a remedy for an asserted unfair labor practice was arbitrary and an abuse of its discretion and requires rescission by this Court.*

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* See *Packerland Packing Co.*, 221 NLRB No. 186 (1975).

C. Substantial evidence supports the Board's finding that the ALA failed to request bargaining and therefore waived any rights it may have had.

Notice of the opening of the new plant was given on December 20, 1972. (ALJD, 18a [22]) Thereafter, the Company explicitly and repeatedly stated to the ALA its position that Regency was a new plant and that there were no automatic transfer rights for any employees. (GC 4, 332a; Tr., 18a)* When the collective bargaining agreement covering ALA members at the Hudson, Hillside and Hoboken plants expired in April 1973, the ALA admittedly did not seek to discuss the effects of the closing of Hudson even though it was fully aware of the Company's plans. (ALJD, 34a [18]) . Upon conclusion of the negotiations, the ALA signed a contract which did not provide for any transfer rights. (ALJD, 34a [16])**

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* While the Company agrees with the Board's decision on the 8(a)(5) issue, it must nevertheless reassert a position it has taken ever since the issuance of the complaint—that the 8(a)(5) portion of the complaint was barred by the 6 month statute of limitations contained in Section 10(b) of the Act. *Local Lodge No. 1424, International Association of Machinists & Aerospace Workers,* 362 U.S. 411 (1960). On the face of the complaint, the Board alleges a violation predicated on events which occurred 14 months prior to the charge.

While General Counsel asserts that American Can "failed initially to notify ALA of its decision to close," no such allegation was made in the complaint, and no such evidence was received at the hearing. The Judge specifically made no findings in that regard other than to comment that *"ALA was immediately made aware of the Company's decision to close Hudson down, but never seriously sought to persuade it to do otherwise."* (Emphasis supplied.) (ALJD, 29a[14])

Even assuming that the first charge encompassed the January 19, 1973 date, the second charge, filed on March 5, 1974, does not, and it cannot act as the vehicle for bringing within the purview of the Board, conduct which occurred more than six months preceding the date of the charge. Once a charge is withdrawn, on that date it frees a respondent from liability for activities occurring more than six months past. *Koppers Company Inc.*, 163 NLRB 517 (1967).

** American Can was dismantling lithographic equipment out on the open floor for all to see, so that it was no secret that the equipment was being moved and moved to Regency in some cases. (Tr., 122a)

ALA deliberately took no action whatsoever until it sent the letter to the NLRB Regional Office on September 20, 1973, the day before the election.* Even then (and now) ALA did not assert a contract bar, or a professed right to have followed the work from Hudson to Regency, or make a showing of interest (even when requested to do so by Schectman, the Board Agent). The only substantive reason urged by ALA for holding up the election was a naked claim that the unit should not include lithographers. This did not raise a question concerning representation nor did it create an obligation to bargain. *Mrs. Tucker's Products,* 106 NLRB 533, *amended,* 106 NLRB 1243 (1953).

The only legal right that the ALA could have asserted was to bargain about the effects of the Hudson shutdown, including a proposal for transfer. But the ALA never even tried to bargain with the Company concerning the effect of the decision to close Hudson, including the terms and conditions, if any, for a transfer of ALA employees to the Regency plant; the Company admits it would have had a duty to bargain about effects, when and if such bargaining was timely requested. *Cf. NLRB* v. *Spun-Jee Corp.,* 385 F.2d 379 (2nd Cir., 1967). Since bargaining was not sought, the ALA waived its rights because

> "The Board and the Courts have long held that an employer has no duty to bargain where the union has not signified its desire to negotiate".** *Montgomery Ward & Co.,* 137 NLRB 418 at p. 422 (1962). *Cf. Elm Hill Meats of Owensboro,* 213 NLRB No. 100 (1974).

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* It is clear from Capione's testimony (Tr. 312a) in which he stated that in his conversation with Olmstead the day before the election, he told Olmstead "Let's not wait any more," that the ALA made a conscious decision to take no action until it sent the letter to the NLRB the day before the election.

** If a union fails to request bargaining on a subject it has knowledge of, it may be deemed to have waived its right to bargain on the issue. *NLRB* v. *Spun-Jee Corp., supra; U. S. Lingerie Corp.,* 170 NLRB 750 (1968).

Having no commitment from the Company with respect to a transfer of employees, ALA had no expectation that any ALA-represented employee would work at Regency. Thus, ALA never represented a majority of employees at Regency and never sought to bargain for a transfer of employees from Hudson. Obviously, it decided not to put the employer to the test of bargaining. Moreover, the evidence shows that ALA's waiver was conscious and knowing. The record as to the open and public character of the Company's plans to move, ALA's observation of what was going on at Hudson and its decision to remain inactive until past the eleventh hour (GC3, 331a; Tr., 314a) belie its current protestations of ignorance or surprise and further supports the Board's finding that the Company did not violate Section 8(a)(5) of the Act.

Conclusion

For the reasons set forth in this brief and in the initial brief of the Company, we respectfully submit that this Court should affirm so much of the Order of the National Labor Relations Board as found that the Company had not violated Section 8(a)(5) of the Act and should in all other respects set that Order aside.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARIE MULHALL , being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 9th day of February , 1976, I served a copy of the annexed paper upon General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, Washington, D.C. 20570; David L.Gore, Esq., Bernard Kleinman, Esq., United Steelworkers of America, AFL-CIO, Five Gateway Center, Pittsburgh, Pennsylvania 15222; Robinson, Silverman, Pearce, Aronsohn, Sand & Berman, 230 Park Avenue, New York, New York 10017

by depositing a true copy of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Marie Mulhall

Sworn to before me this
9th day of February , 1976.

Joseph G. DeRespino

JOSEPH G. DERESPINO
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-4507926
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1977